U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: DEC 0 3 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the AAO on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding the defined equivalent of an advanced degree. The petitioner seeks employment as an elementary school teacher. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions with post-baccalaureate experience equivalent to an advanced degree under the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B). The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT 90), P.L. 101-649, 104 Stat. 4978 (Nov. 29, 1990), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must establish that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must establish that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The term "prospective" is included here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on June 29, 2012. Part 4, line 6 of that form asked: "Has any immigrant visa petition ever been filed by or on behalf of this person?" The petitioner answered "Yes." In the event of a "Yes" answer, the form instructed the petitioner to "Attach an explanation," but there is no explanation in the record. USCIS records show that [redacted] in Maryland filed a Form I-140 petition on October 7, 2008, seeking to classify the beneficiary as a member of the professions under section 203(b)(3)(A)(ii) of the Act. That petition included an approved labor certification. The director approved the petition on February 4, 2009, with a priority date of April 30, 2008.

The initial filing of the present petition included a short cover letter from counsel, who did not articulate any grounds for approving the national interest waiver. Instead, counsel asked for "understanding for not being able to submit [a] detailed cover letter" for various reasons, "including the fact that so many teachers instructed [counsel] to file their NIW petitions."

The petitioner did not claim any degree above a baccalaureate, but submitted evidence of a bachelor's degree and over five years of progressive post-baccalaureate experience in her specialty. The petitioner possesses the equivalent of a master's degree, under the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B). The petitioner worked at in the Philippines from 1997 to 2005; at system), from October 2005 to July 2011; and at the a private child care center in Maryland, from January 2012 to the time of filing.

The petitioner's *curriculum vitae* described her educational and professional background. Under "Objective," the petitioner did not list any professional goals. Instead, she stated that her objective was "[t]o obtain a permanent residency status in the United States of America."

In a statement that accompanied the petition, the petitioner described her background and stated:

> My teacher's performance record shows outstanding in yearly evaluation until such time I resigned in the Philippines. Its impact to school and students maintained high performing, good track record and consistent discipline towards students. The integration of values amongst students tantamount to the performance indicator to foster learning and motivation for them. With current trends in education, I want to establish myself in the top level management in the few years where I want to be a transformational leader. I want to be an administrator in line with management. This is to work in fast-pacing management system. The psychology is to bring change to the organization; in a way that I am link to both worlds – education and technology.
>
> My mission and vision in the teaching world in the US: to produce valuable students in developing their knowledge, skills and aspiration to be responsible citizens. Similar, establishing mission by providing continuous training, development and advancement for students and teachers; a continuous research to identify the specific factors responsible for successful outcomes and to ascertain their range of applicability and the extent to which they can be generalized. I always thought of serving the government of the United States of America by supporting the government programs for economic development, managing equal opportunities among the citizens, and support progression in the government with their ideals and principles to make this nation a beautiful place to live in.

The petitioner's statement did not specifically address the job offer requirement, the national interest waiver, or why the petitioner considered herself to be eligible for that waiver.

The petitioner submitted copies of several certificates. Some of the certificates acknowledged her participation in workshops or her completion of training courses. Others recognized her contributions as a teacher. The petitioner did not establish that any of these certificates showed impact or influence beyond the local level.

The petitioner submitted several witness letters. mother of one of the petitioner's students at expressed appreciation for the assistance her child received from "most teachers, especially [the petitioner]."

instructor at the of the Philippines, stated:

> I have . . . been the Adviser of Book Reader's Society with 250 (students) members. With the innovative approach in technology . . . [the petitioner] has been our contributor/consultant for the said organization. Her ideas and knowledge in developing the young minds result to [*sic*] appreciation of students' interests in the Arts and Literature. Most the literary genre [*sic*] had been taught through the ideas of the candidate.

The remaining witnesses are all teachers or administrators at schools where the petitioner has taught. For example, principal of stated: "She was always innovative and dynamic in the classroom, infusing her students with tremendous motivation and instilling in them an appetite for the joys of learning. I consider [the petitioner] to be one of those extraordinary educators who always put forth a wholehearted effort with amazing results."

A March 14, 2011 electronic mail message from early childhood literacy coach for Preschool Literacy Project, reads: "CONGRATULATIONS!!! Your class had the highest scores! . . . What strategies are you using to help students acquire new vocabulary? Could it be the use of technology throughout the day, parent involvement or something else?" The record does not show whether or not the petitioner responded with the answer to the question, or whether other schools met with similar success by adopting her methods.

The witnesses hold high opinions of the petitioner's accomplishments and abilities, but they did not establish that her work has had any impact or influence on education outside of the schools where she has taught.

On January 16, 2013, the director issued a request for evidence (RFE), instructing the petitioner to submit documentation to establish that the benefit from the petitioner's work is national in scope and otherwise meets the guidelines set forth in *NYSDOT*. In response, counsel stated:

> Immigration Act of 1990 (IMMACT 90) which enacted . . . the 'National Interest Waiver" included 'educators' as among the targets of this legislation, specifically stated – 'this bill provides for vital increases for entry on the basis of skills, infusing

> the ranks of our scientists and engineers and educators with new blood and new ideas.'

Elsewhere in the brief, counsel clarified that the quoted language comes not from the statute itself, but from comments made by then-President George H.W. Bush as he signed the legislation. IMMACT 90 did in fact create the national interest waiver, and the president mentioned "educators" in his remarks, but it does not follow that a blanket waiver for educators was either the intent or the result of the legislation. The same statute plainly subjected professionals – including "scientists and engineers and educators" – to the job offer requirement.

Counsel contended that the *NYSDOT* decision provided no specific definition of the "national interest," and that Congress filled this void with the passage of the No Child Left Behind Act (NCLBA):

> Congress has in effect remarkably engraved the missing definition upon the concept of 'in the national interest,' centered on the 'Best Interest of American School Children.' More importantly, U.S. Congress also provided the means to achieve this now defined 'in the national interest,' i.e., 'Hiring and Retaining Highly Qualified Teachers.' Interestingly, "NCLB Act" also specified the 'Standard of a Highly Qualified Teacher.'

In discussing the NCLBA, above, counsel placed several phrases in quotation marks, but none of those phrases appears in the text of the NCLBA. The term "best interest," with respect to children, appears only in provisions relating to homeless students. The NCLBA contains no mention of the national interest waiver or any immigration benefits for foreign teachers, and it did not amend section 203(b)(2)(B) of the Act (which created the waiver). Counsel contends that Congress specifically intended to make the waiver available to "highly qualified teachers" when it passed the NCLBA, and that "favorable decisions for the NIW teachers" is thereby "honoring the Congressional intent in No Child Left Behind Act of 2001." Counsel, however, cited no specific language from the statute itself, its legislative history, or the implementing regulations to support this claim. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). Here, the petitioner has not established that Congress intended to exempt teachers from the job offer requirement, either through section 203(b)(2) of the Act, the NCLBA, or any other federal legislation. Congress's only direct statement on the matter has been to apply, not waive, the requirement. Counsel has not supported the claim that the NCLBA amounts to Congress's definitive statement on waiving the job offer requirement for "highly qualified teachers."

The NCLBA did not amend section 203(b)(2) of the Act or otherwise mention the national interest waiver. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95 (November 12, 1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to that Act, to create special waiver provisions for certain physicians. Because Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*, counsel has not established that the NCLBA indirectly implies a similar legislative change.

Counsel's response to the RFE discussed other federal initiatives beyond the NCLBA. These programs establish that the federal government places a priority on improving the quality of education, but counsel did not establish that any of these programs had the express or implied result of changing immigration policy toward teachers. Section 203(b)(2)(A) of the Act remains in effect, and therefore teachers, "highly qualified" or otherwise, remain subject to the job offer requirement.

"Highly Qualified Teachers," as a class, play a significant collective role in implementing the provisions of the NCLBA. It does not follow, however, that every such teacher individually qualifies for special immigration benefits as a result, or that collective benefit justifies a blanket waiver for every such teacher, when the waiver otherwise rests on the specific merits of individual intending immigrants.

Counsel claimed that the labor certification process presents a "dilemma" because the petitioner's qualifications significantly exceed the minimum qualifications that an employer could specify on an application for labor certification, and "the employer cannot overstate the qualification requirement for the job offer nor can it tailor-fit in favor of the alien worker." In this instance, PGCPS has already obtained an approved labor certification for the petitioner, which has formed the basis of an approved immigrant visa petition.

Counsel stated:

> there is more likelihood than not as dictated by experience that replacing 'Highly Qualified Teachers' with those having only minimum qualification that these federally funded schools would fail to meet the high standard required under the No Child Left Behind (NCLB) Law resulting not only [in] closure of these schools but loss of work for those working in those schools.

Counsel identified no "federally funded school" that has closed as a result of failing to meet NCLBA standards. Attributing this claim to "experience" cannot suffice in this regard. Also, counsel has not shown that awarding the waiver to the petitioner would prevent school closures on a nationally significant scale. This assertion is, instead, effectively another claim in support of a blanket waiver for "Highly Qualified Teachers," as the national effect would be collective rather than individual.

Counsel cited a need for improvement in science, technology, engineering and mathematics (STEM) education, but the record does not establish that the petitioner specializes in teaching those subjects. Therefore, counsel has not established the relevance of this assertion, even if one teacher would be in a position to resolve the national crisis in teaching those subjects.

Turning to the petitioner's individual qualifications, counsel listed several previously submitted exhibits, but did not explain how these exhibits satisfy the *NYSDOT* national interest test. A successful teaching career does not establish or imply eligibility for the waiver.

The director denied the petition on April 17, 2013. The director acknowledged the petitioner's professional credentials and counsel's assertions about the general crisis in public education, but paraphrased *NYSDOT* by stating:

> A waiver of the job offer is not warranted solely for the purpose of ameliorating a local labor shortage, because the labor certification process is already in place to address such shortages. Similarly, the Department of Labor allows a prospective U.S. employer to specify the minimum education, training, experience, and other special requirements needed to qualify for the position in question.

Similar language appears in *NYSDOT* at 218. That same decision specified "elementary school teachers" as an example of an occupation with substantial intrinsic merit, but that lacks national scope. *Id.* at 217 n.3.

The director determined: "The petitioner did not provide sufficient and convincing evidence that her employment will be national in scope nor has she demonstrated that she has prior demonstrable achievements with some degree of influence on the field as a whole."

On appeal, counsel devotes the majority of the appellate brief to variations of the basic assertion that the NCLBA and other initiatives created an implied blanket waiver for teachers that supersedes *NYSDOT*, but none of these assertions succeed. Counsel repeats, word for word, several pages of assertions from the RFE response. There is no support in statute, regulation, or case law to support counsel's primary contention that the overall importance of education outweighs the statutory job offer requirement that remains in effect. *NYSDOT* established that USCIS will not declare "blanket waivers for entire fields of specialization." *Id.* at 217. Since the publication of *NYSDOT*, Congress has created only one blanket waiver, for certain physicians as described at section 203(b)(2)(B)(ii) of the Act. USCIS will not infer an implied blanket waiver from legislation, such as the NCLBA, that contains no immigration provisions.

Counsel contends that *NYSDOT* "required vague and overly burdensome evidence more fitting to the cause of an Engineer. USCIS is expected to stipulate clear basis for evidences requested and at least meritoriously rebut the evidences submitted in the initial filing and in the response to Request for Evidence." Counsel asserts that the director did not specify what sort of "contributions of unusual significance . . . would warrant a national interest waiver." The beneficiary in *NYSDOT* was an

engineer, but the guidelines in that decision are intentionally broad, and not restricted to engineers. Because the waiver is potentially available to workers in a wide range of occupations, there is no single, rigid set of specified evidentiary requirements; the available evidence will vary on a case-by-case basis. The director is not required to speculate as to how an elementary school teacher might exert widespread influence on her field. Rather, the petitioner must submit evidence that demonstrates such influence. Strong credentials and favorable performance reviews do not show influence or impact on the field. Counsel's claim that USCIS must "rebut" the petitioner's previously submitted evidence implies that the petitioner's evidence established an initial presumption of eligibility that does not actually exist.

Counsel states: "Assuming *NYSDOT* is apposite, the perennial question is what is the standard to be met in order that an NIW petitioner's proposed employment will have national-level benefit." This passage incorrectly implies that *NYSDOT*'s applicability is debatable. As a designated precedent decision, *NYSDOT* is binding on all USCIS employees. *See* 8 C.F.R. § 103.3(c). The director made no error in following published precedent, as required.

Turning to the petitioner's individual merits, counsel asserts that the petitioner "is an effective teacher in raising student achievement in STEM" and points to her "proven success in raising proficiency of her students." Counsel cites no evidence on appeal to support these claims, which come a page after counsel cited statistics showing that [redacted] remains an underperforming district in Maryland.

On appeal, counsel contends "the Director is requiring more from the beneficiary's credentials tantamount to having exceptional ability," even though one need not qualify as an alien of exceptional ability in order to receive the waiver. It is evident from the statute that the threshold for exceptional ability is below, not above, the threshold for the national interest waiver; it is possible to establish exceptional ability but still not qualify for the waiver. Also, the director did not require the petitioner to establish exceptional ability in her field. Instead, the director found that the petitioner's evidence failed to establish that her work has had an influence beyond the school districts where she has worked.

Counsel asserts that the petitioner "has submitted overwhelming evidence" of eligibility, and lists several previously submitted exhibits under the heading "Awards and Recognition." The petitioner has not established that these materials are "overwhelming evidence" in her favor. Local recognition can help support a claim of exceptional ability, under the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F), but exceptional ability does not establish or imply eligibility for the waiver.

The petitioner has not established a past record of achievement at a level that would justify a waiver of the job offer requirement. The petitioner need not demonstrate notoriety on the scale of national acclaim, but the national interest waiver contemplates that her influence be national in scope. *NYSDOT* at 217, n.3. More specifically, the petitioner "must clearly present a significant benefit to the field of endeavor." *Id.* at 218. *See also id.* at 219, n.6 (the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole.").

By statute, engaging in a profession (such as teaching) does not presumptively entitle such professionals to the national interest waiver. Congress has not established any blanket waiver for teachers. Eligibility for the waiver rests not on the basis of the overall importance of a given profession, but rather on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The AAO will dismiss the appeal for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.